Białostockie Studia Prawnicze
2017 vol. 22 nr 4

DOI: 10.15290/bsp.2017.22.04.21

Alexandra Habriyanchik
State University of Grodno
alvart87@gmail.com

Concerning Highlights of Mediation Agreements Execution in Belarus

Abstract: The Republic of Belarus is actively developing a variety of alternative dispute resolution mechanisms, in particular mediation. Mediation is a relatively new institution for Belarusian legislation and law enforcement. The first normative legal act regulating the use of mediation in conflict resolution – the Law of the Republic of Belarus 'On Mediation' – was adopted on 24 January 2014. Currently, the practice of using mediation procedures is being developed while there are a number of problems, both legislative and practical, in the field.

The article addresses execution of mediation agreements reached by the parties as a result of mediation. The author analyzes the concept of a mediation agreement; its relationship to international agreements, particularly the approval of a mediation agreement by a court; as well as features and current problems of enforcement of mediation agreements in civil and commercial proceedings.

Based on the analysis of national legislation and practice, the author offers reasonable proposals to improve mediation agreement enforcement procedures that will encourage the parties to use this alternative method of dispute resolution.

Keywords: mediation agreement, mediation, voluntary agreement, notarial certification of a mediation agreement, civil proceedings, commercial proceedings

Introduction

Various alternative dispute resolution (ADR) tools are currently gaining ground in the Republic of Belarus, such as arbitration, international commercial arbitration and mediation. Mediation proceedings originated in Belarus after the introduction of Chapter 17 'On Brokerage in Dispute Resolution' into the Belarusian Code of Commercial Procedure in 2004.[1] As a result, mediation as a specific alternative dispute resolution tool was legally introduced.

1 Code of commercial procedure of the Rep. of Belarus dd. 15 December 1998 No. 219-3: as amended on 1 July 2014, No. 174-3 (ЭТАЛОН. Законодательство Республики Беларусь / Нац.

Mediation is a relatively new tool for Belarusian law and enforcement. It gained popularity in 2011 after the legal experiment (also called a 'pilot project') powered by the Superior Economic Court of Belarus. The beneficial results of the experiment demonstrated the feasibility of mediation as a legal tool, which resulted in the Law of the Republic of Belarus 'On Mediation' adopted on 24 January 2014.[2]

Mediation law in Belarus was developed in full compliance with international standards as well as based on the UNCITRAL Model Law on International Commercial Conciliation[3] (2002) and Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters.[4]

A legal framework for application of mediation is gradually being developed in the Republic of Belarus. For instance, the mediation law warrants maintenance of the register of mediators as well as the register of legal entities performing mediation, mediation procedure is stipulated by the Mediation guidelines,[5] there is a Qualifications commission on mediation under the Belarusian Ministry of justice. Moreover, a mediator's Code of conduct was resolved by the Belarusian Ministry of Justice, which regulates codes of conduct for mediators both with aggrieved parties and other mediators.

Training qualified mediators is an important condition for the development of mediation. Three educational institutions in the Republic of Belarus have been approved by the Ministry of Justice to provide mediation training: the Center for Mediation and Negotiation, the Center "Mediation and Law" under the Belarusian Republican Union of Lawyers and the Advanced Training Institute, which trains judges, prosecutors, etc. (these three institutions are all located in Minsk). According to the Belarusian Ministry of Justice website, there were 365 licensed mediators in the country in 2016.

центр правовой информ. Респ. Беларусь, Минск 2017).

2 The Law of the Rep. of Belarus 'On Mediation' No. 58-З, dd 12 July 2013 (ЭТАЛОН. Законодательство Республики Беларусь / Нац. центр правовой информ. Респ. Беларусь, Минск 2017).

3 UNCITRAL Model Law on International Commercial Conciliation 24 June 2002, http://www.uncitral.org/uncitral/ru/uncitral_texts/arbitration/2002Model_conciliation.html (26.12.2016).

4 Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters, http://www.mediacia.com/files/Documents/Directive_2008_rus.pdf (28.12.2017).

5 Resolution of the Council of Ministers of the Rep. of Belarus 'Concerning approval of the rules of mediation procedure' No. 1150, dd. 28 December 2013 (ЭТАЛОН. Законодательство Республики Беларусь / Нац. центр правовой информ. Респ. Беларусь, Минск 2017).

1. Mediation Agreement Execution

According to paragraph 1 of the Belarusian Law on mediation, "mediation is the negotiation process between the parties with participation of a mediator aimed at the resolution of disputes by reaching mutual agreement of the parties." Mediation is applied in Belarus for the resolution of disputes arising from civil relations including those related to business or commercial activity as well as employment and family related issues. We should note here that, at present, the mediation procedure is not applied to criminal and administrative proceedings, however, the laws on mediation imply the possibility of using mediation for other types of proceedings in cases stipulated by legislative acts.

Mediation can be applied by the parties both before their appeal to court within civil or commercial proceedings as well as after initiation of such proceedings in the court. We consider extrajudicial mediation the best choice here as the parties realize the necessity of conflict resolution but apply mediation instead of invoking judicial proceedings. Regrettably, due to the relatively recent introduction of the mediation process in Belarus, the public has yet to form a positive attitude toward the procedure. Our practice as a mediator demonstrates that a sizeable number of people doubt the possibility of extrajudicial resolution and as a result call into question the mediation agreement. Presumably, mediation was integrated into Belarusian judicial proceedings to develop a positive image among the general public. Thus, in civil proceedings, parties may take legal action to initiate a mediation process after the commencement of proceedings. In this case, the court may stay the proceeding under Article 160 of the Civil Procedure Code to initiate mediation procedure between the parties. Therefore, the parties have discretion to use mediation while mediation itself stays beyond the scope of civil proceedings.

In commercial proceedings, the parties may apply for extrajudicial and judicial mediation. In such case, the parties waive extrajudicial mediation and the economic court, unlike the civil court, does not stay proceedings. Instead, at the request of the plaintiff, the court shall dismiss the claim without prejudice subsequently sealing the mediation agreement of the parties if it corresponds to the features of amicable settlement. The advantage of mediation in commercial proceedings is a 100% refund of the previously paid state tax encouraging the parties to waive mediation after filing a claim.

We believe that the consequences of mediation waived within the judicial process by the parties in the Commercial Procedure Code may be less successfully than in the Civil Procedure Code. One of the parties in the mediation agreement may fail to perform or mediation may end unfulfilled. Where this occurs, the court must then proceed to adjudicate the dispute. In civil proceedings this is possible without any difficulty simply by resumption of the original proceedings. However, in commercial proceedings a new lawsuit in the dispute shall be required (as the previous

proceedings had been completed leaving the claim without consideration) and successive proceedings (conducting preparation of the case for trial, etc.) will need to be initiated.

It seems that such state of affairs in commercial proceedings may provoke abuse from the defendants as they may reach mediation agreement with the plaintiffs just for the purpose of closure of the proceedings and after the court leaves the claim undecided, the defendants can simply abandon the agreement to mediate.

As for judicial mediation in commercial proceedings, this is a conciliation procedure initiated by the Parties of the dispute to the court after suspension of the proceedings (Art. 146 Commercial Procedure Code). According to Article 1 of the Code, conciliation procedure is mediation carried out under the Commercial Procedure Code after the initiation of proceedings in a dispute under an agreement concluded by both parties in accordance with established conciliation procedure.

Although the notion of mediation is used to define conciliation procedure, we believe that conciliation procedure cannot be defined entirely as mediation. A specific feature of this procedure is that court officials empower the agreement reached by the parties. At the same time, the agreement on reconciliation is a procedural document, fixing the agreements reached by the parties which shall then be approved by the court as a settlement agreement. The disputing parties, in turn, unwittingly fall into a difficult situation, not knowing where there is mediation and judicial reconciliation. It seems that the procedural and legal nature of the conciliation procedure cannot be compatible with such fundamental principles of alternative dispute resolution (mediation) as the independent status of the intermediary (mediator), privacy and voluntariness.

Undoubtedly, the best scenario for the parties to complete mediation procedure is to conclude a mediation agreement. According to paragraph 15 of the Law on Mediation, a mediation agreement is a written agreement reached by the conflicting parties. A mediation agreement requires to contain information about the parties, the mediator, the subject of the dispute, as well as the parties' commitment in resolving the dispute and the deadlines of their execution. A mediation agreement should be signed by the parties and by the mediator. A mediation agreement should neither be in breach of the law nor violate the rights of third parties.

Therefore, any agreement reached should be of particular value to the parties when it is mutually beneficial and its execution is fully ensured. Specifically, mediation agreement execution has to be both voluntary and *bona fide* (part 3, paragraph 15 of the Law on mediation). After reaching a mediation agreement the parties are required to fulfill their commitments in an honest accurate manner and in full. According to Belarusian statistics, in the majority of cases (approximately 90–92 %) of mediation agreements concluded by the parties are fulfilled voluntarily. However, the issue of enforced execution of mediation agreements is the key to expanding the use of the procedure in resolving conflicts.

How can a mediation agreement be properly executed in a case where one of the parties fails to commit to the procedure voluntarily and accurately?

First, Belarusian mediation law provides that parties can be liable for violating a mediation agreement. Second, enforced execution of a mediation agreements is to be carried out in compliance with remedial legislation. This is where we can encounter certain difficulties. Mediation agreements can be concluded by the parties both after appeal to the court and without appeal to the court.

An agreement reached by the parties as a result of mediation procedure carried out after the dispute was filed in court must be regarded by the court as a voluntary settlement (according to part 5 of paragraph 15 Law on Mediation). Civil and commercial proceedings are quite different in the sphere of legal regulation between the parties regarding mediation and mediation agreements. Thus, there are chapters in the Commercial Procedure Code on the conciliation procedure (court mediation), and the reaching and execution of voluntary settlements. However, there is no such reference in the Civil Procedure Code and issues related to the reaching and execution of mediation agreements are regulated by the Law on Mediation.

According to paragraph 160 of the Civil Procedure Code, the general court shall suspend proceedings on a case if the parties conclude a mediation agreement. According to paragraph 146 of the Code, the economic court may suspend the proceedings if a mediator is assigned for mediation procedure. The duration of mediation procedure in commercial proceedings may not exceed one month while the duration of mediation in civil proceedings may not exceed six months (paragraph 156.1 Civil Procedure Code, paragraph 13 Law on Mediation).

The conciliation procedure in commercial proceedings (of judicial mediation) shall result in agreement on the reconciliation of the parties, which is in fact a separate agreement based on the rejection of the claim, acknowledgment of claim, amicable agreement or a new agreement. This means that a conciliation agreement is a separate procedural document that voluntary agreement should not be based upon. Also, according to Section 3 Article 157 Commercial Procedure Code, a conciliation agreement may direct the parties to conclude a new agreement to be attached to the main agreement. In this case the violated rights of the new agreement in the event of failure by the parties to voluntarily execute it shall be protected according to the Code. If the parties appealed to extrajudicial mediation and concluded a mediation agreement which one of the parties failed to perform voluntarily, the other party may appeal to the economic court and have it enforced according to the rules of Section IV of the Code. Such mediation agreement should comply with the Code's requirements concerning conciliation agreements, in particular it must not be in breach with legislation or violate the rights of third parties (Paragraph 3, section 5, article 15 Law on Mediation, part 3, article 40-1, articles 262-1-262-3 Commercial Procedure Code). Application for issuance of an executive document for enforcement of a me-

diation agreement can be submitted within six months from the date of expiry of the voluntary execution of a mediation agreement.

In civil proceedings, the parties may appeal only to extrajudicial mediation which should result in a mediation agreement of the parties. Later, depending on the conditions of a mediation agreement, according to Article 285-1 Civil Procedure Code the parties may submit an application for approval of a settlement agreement, withdrawal of the claim by the plaintiff or recognition of the claim by the defendant. After approval by court the trial may be completed either in termination of proceedings (*nolle prosequi* or by conclusion of a conciliation agreement), or by making a decision (in the case of recognition of the claim by the defendant). Thus, in fact, a mediation agreement concluded by the parties in a civil procedure shall be transformed into a conciliation agreement to be approved by a judge. If the parties do not appeal to the court of general jurisdiction for sanctioning a mediation agreement, the parties shall fail to have guarantees of its subsequent enforcement.

We should note here that the procedure of concluding a voluntary agreement by the parties is clearly observed only in the Commercial Procedure Code as in Chapter 10 "Voluntary Agreement" certain requirements for such agreement are observed (writing standards, signatures of the parties or their representatives, requirements as to content, etc.). At the same time neither the Civil Procedure Code, nor the Civil Code of the Republic of Belarus contain any requirements on voluntary agreement. It seems that for common understanding of the notion of voluntary agreement and the rules of its conclusion there is a need to unify legislation of the mentioned Codes in terms of voluntary agreement.

It must be noted that a mediation agreement is a much broader notion than a voluntary agreement. Thus, during a mediation procedure the parties can discuss any issues which they consider important for dispute resolution. As a result, mediation agreements often include conditions beyond the judicial case; however, such conditions shall be treated by the court as irrelevant and, therefore, shall not be stated in a voluntary agreement. So, a voluntary agreement can only be regarded as a certain part of a mediation agreement specifying relations of the parties in the dispute. In any case, before a mediation agreement is affirmed as a voluntary settlement of the dispute, its validity shall be checked by general courts followed by closure of judicial proceedings. Further, the parties have the procedural possibility of compulsory execution of voluntary agreement by applying to the court for an enforcement order.

Returning to the issue of security of forced execution of mediation agreements concluded out of court, we should note that in the Republic of Belarus the parties, in fact, left without procedural protection of execution of such agreements. The importance of compulsory execution of out-of-court mediation agreements is emphasized in international acts. Thus, the authors of the UNCITRAL Model Law note that enforced execution of a voluntary agreement should increase the attractiveness of conciliation proceedings. The need for enforced execution of mediation agreements

concluded by means of extrajudicial mediation was also repeatedly mentioned in the Recommendations of the Committee of Ministers of the Council of Europe. According to Article 6 of EU Directive 2008/52/EC, Member States should provide for the instruments of recognition of mediation agreement to be enforced and thus guarantee the concerned party to demand the fulfillment of the terms of a written agreement reached as a result of mediation (regardless of the type of mediation).

The legislation of certain countries on mediation, e.g., Russia and Kazakhstan, provides that when a mediation agreement is reached by the parties as a result of extrajudicial mediation it shall be regarded as a civil transaction aimed at the establishment, modification or termination of rights and obligations of the parties. In such case, it appears that the protection of rights violated as a result of non-performance or improper performance of a mediation agreement shall be carried out in ways provided for by civil legislation in particular trial disputes arising from failure of a mediation agreement. This situation is in fact a paradox since the parties trying to escape from the proceedings shall end up with their dispute resolved in court. In this regard we should stress that the reference to the civil nature of a mediation agreement is subject to well-founded criticism. Therefore, mediation can be applied in civil, family and labour disputes as well as in criminal and administrative cases in the Republic of Belarus in the long run, therefore a mediation agreement may contain terms of different legal nature demonstrating an integrated and interdisciplinary character.

At the same time, we should stress that a mediation agreement concluded as a result of extrajudicial mediation is a certain legal fact, which binds to the establishment, modification or termination of rights and obligations of the parties. So, in case one of the parties violates its obligations arising out of a mediation agreement, the other party shall need to protect their rights and interests through legally enshrined methods, for example, a bona fide member of the mediation shall be entitled to file a lawsuit arising from the failure of a mediation agreement. This means that, in fact, the parties again return to legal proceedings.

Summary

Belarusian legislation does not provide for a simplified enforcement of a mediation agreement reached out-of-court. On the one hand, the absence of such mechanism is relevant to the notion of mediation because if a mediation agreement is not executed voluntarily it means that the mediation is not successful so it is then necessary to use "traditional" ways of dispute resolution.

On the other hand, in some cases one of the parties may abuse their rights, i.e., to conclude a mediation agreement without any intention of adhering to it (for example, to temporize it). In this case, we suppose that it is necessary to provide a specific simplified method of mediation agreement enforcement reached out of extrajudicial

mediation without the necessity to appeal to court, obtain a judgment and obtain an enforcement order. There may be several ways to do this (at the discretion of the parties involved). As international experience shows, this shall require a notary (for notarization of the mediation agreement), an arbitrator (or a mediator with an arbitrator's authority) and a judge who shall approve the extrajudicial mediation agreement under the simplified procedure and shall actually give it the status of a judgment.

We believe that today, with respect to the Republic of Belarus, the best option is legislative recognition of a mediation agreement, thus giving it executive power. De facto notaries in the Republic of Belarus have already been certifying concluded mediation agreements. In turn, the mediator explains to the parties that the guarantee of mediation agreement execution is its possible notarization, subsequently, if one of the parties fails to perform, the second party shall be able to apply to a notary for obtaining notarial writ. Notarization of a mediation agreement is the easiest and quickest way to ensure its execution which shall not require a fundamental reform of the current legislation. It goes without saying that an extrajudicial agreement must not contradict with morality, mandatory law or affect the rights of parties other than those directly party to the mediation. However, it remains the mediator's professional responsibility to follow the mentioned requirements during conclusion of a mediation agreement.

BIBLIOGRAPHY

Code of commercial procedure of the Rep. of Belarus dd. 15 December 1998, No. 219-3: as amended on 1 July 2014, No. 174-3 (ЭТАЛОН. Законодательство Республики Беларусь / Нац. центр правовой информ. Респ. Беларусь, Минск 2017).

Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters, http://www.mediacia.com/files/Documents/Directive_2008_rus.pdf

Resolution of the Council of Ministers of the Rep. of Belarus 'Concerning approval of the rules of mediation procedure' No. 1150, dd. 28 December 2013 (ЭТАЛОН. Законодательство Республики Беларусь / Нац. центр правовой информ. Респ. Беларусь, Минск 2017).

The Law of the Rep. of Belarus 'On Mediation' No. 58-3, dd. 12 July 2013 (ЭТАЛОН. Законодательство Республики Беларусь / Нац. центр правовой информ. Респ. Беларусь, Минск 2017).

UNCITRAL Model Law on International Commercial Conciliation 24 June 2002, http://www.uncitral.org/uncitral/ru/uncitral_texts/arbitration/2002Model_conciliation.html